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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FRANK ROCCO,

Respondent and Appellant,

v.

NANCY SHEARER,

Petitioner and Respondent.

H041123

(Santa Clara County  
Super. Ct. Nos. 113PR171921,  
114PR173943<sup>1</sup>)

This appeal involves orders issued by the probate court in two separate actions involving two of decedent Rose Rocco's children, appellant Frank Rocco and respondent Nancy Shearer. Rose,<sup>2</sup> who was then 86 years old, sustained serious injuries while living with Rocco. In a separate criminal proceeding, Rocco pleaded guilty to felony elder abuse of Rose (Pen. Code, § 368, subd. (b)(1)) and admitted the special allegation that, in committing that offense, he personally inflicted great bodily injury on her (Pen. Code, § 12022.7, subd. (c)).

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<sup>1</sup> On our own motion, we have added to this appeal the superior court number associated with the judgment referenced in appellant Frank Rocco's notice of appeal and attached to his civil case information statement.

<sup>2</sup> Since Rocco shares his mother's last name, we refer to his mother as Rose.

After Rose's hospitalization, Shearer was appointed conservator of Rose's person and her estate in Santa Clara County Superior Court case No. 113PR171921 (the conservator action). Following Rose's death, in a separate probate action (Santa Clara County Superior Court case No. 114PR173943 (the estate action)), Shearer successfully petitioned the court for a judgment deeming that Rocco predeceased Rose pursuant to Probate Code sections 250 and 259, thus disinheriting him.<sup>3</sup>

Representing himself and while in prison, Rocco filed a notice of appeal. The notice listed the case number of the conservator action, but in the section describing the judgment or order from which the appeal is taken, Rocco indicated that he was appealing from a judgment of April 30, 2014. That judgment, however, had been issued in the estate action. The confusion manifest in Rocco's notice of appeal (by listing the number of one case but stating the appeal is from a judgment in a different case) has persisted throughout the course of this appeal. Rocco's briefing, for example, makes arguments with respect to both the conservator action and the estate action.

We conclude we have jurisdiction to consider Rocco's claims in both cases but, due to Rocco's failure to provide an adequate record, we are unable to conduct a meaningful review of them. We therefore affirm the judgments.

## **I. FACTS AND PROCEDURAL BACKGROUND**

### *A. Record on Appeal*

As the content of the record on appeal is dispositive of Rocco's claims, we explain in some detail what that record does and does not contain.

Rocco filed a notice of appeal listing the conservator action case number (113PR171921) but referencing the judgment from the estate action (114PR173943). As part of his appeal, Rocco designated a number of documents, all from the conservator action, for inclusion in the clerk's transcript. On July 27, 2017, the trial court certified

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<sup>3</sup> Unspecified statutory references are to the Probate Code.

the record requested by Rocco. Rocco never sought to supplement that record with documents from the estate action.<sup>4</sup>

The record on appeal does not contain any reporters' transcripts of any hearing conducted in either the estate action or the conservator action. The record on appeal does not contain any orders at all issued by the trial court in the conservator action other than the order appointing Shearer as conservator. The record includes the judgment in the estate action (attached to Rocco's civil case information statement)<sup>5</sup> but not any other documents filed in the estate action.

*B. Procedural and Factual History Contained in the Record on Appeal*

Given the limited documents included in the record, we derive most of the background facts from Shearer's verified petition to disinherit Rocco:

Rocco urged Rose, before her death, to divorce her husband of 32 years and sell their family home.<sup>6</sup> Once the house sold in October 2012, Rocco and Rose lived in various motels, and Rocco used Rose's bank account to pay for their lodgings.

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<sup>4</sup> Rocco filed in this court a motion to augment the record on appeal to include a variety of documents from Rocco's criminal case. This motion was denied by separate order of this court dated December 21, 2017, "without prejudice to a further showing that the requested documents were part of the record in the proceeding in the lower court which is the subject of this appeal." Our review of the docket does not show that Rocco ever renewed his motion to augment, although certain pages from the documents Rocco submitted with his motion to augment do appear in the record on appeal. Those consist of one page from a police report dated December 28, 2012, and two pages from a probation report dated May 28, 2013. Accordingly, other than the pages which were already included in the record on appeal, we have not considered any of the documents contained in Rocco's motion to augment.

<sup>5</sup> On our own motion, we order the record augmented with a copy of this judgment, as it was attached to the civil case information statement filed in this court. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

<sup>6</sup> In an unverified letter dated December 31, 2013, Rocco denies coercing or pressuring Rose into divorcing her husband and states that Rose wanted the divorce "after decades of verbal abuse, mind control games, duress, and fraud."

On December 14, 2012, the Morgan Hill Fire Department was called to the Budget Motel and discovered Rose unresponsive. Rose, accompanied by Rocco, was transported by ambulance to a hospital, and Rocco reported that Rose was injured in a fall at the motel. Hospital personnel noticed that Rose's injuries were not consistent with falling, and eventually the police were contacted. Rocco ultimately told a police officer that he began hitting Rose in October 2012 because he "wanted to punish her" for waking him up by repeatedly getting out of bed. Rocco wrote a note of apology to Rose, saying he would "be getting counseling to deal with this problem[,] . . . [and he] look[ed] forward to continu[ing] to take care of you."

The medical records from the hospital indicate that Rose suffered from dementia and was admitted with a number of injuries, including multiple rib fractures, a neck fracture, hip fractures, significant bruising and skin tears, black and bleeding "raccoon" eyes, bedsores, and lung contusions. On December 21, 2012, while still in the hospital, Rose was diagnosed with pneumonia and underwent a tracheostomy as well as insertion of a gastronomy tube.

According to the probation report from his criminal case, portions of which Rocco submitted in the conservator action, Rocco was charged with felony elder abuse (Pen. Code, § 368, subd. (b)(1)) with an allegation that he "[p]ersonally [i]nflicted [g]reat [b]odily [i]njury" on a person "70 years of age and older" in violation of Penal Code section 12022.7, subdivision (c).

On January 15, 2013, Rose was transferred to a long-term care facility. On April 2, 2013, the probate court appointed Shearer conservator of Rose and Rose's estate. Rose died on April 13, 2013.

On April 4, 2013, Rocco pleaded guilty<sup>7</sup> to felony elder abuse and admitted personally inflicting great bodily injury on Rose in the commission of that offense (Pen. Code, §§ 368, subd. (b)(1), 12022.7, subd. (c)). Rocco was sentenced to seven years in prison.

In a declaration filed on December 23, 2013, in “Support of the Petition for First and Final Accounting and to Pay Attorney’s Fees and Fees to Conservator,” Shearer’s attorney, Robert L. Mezzetti II sought reimbursement of \$9,958 in attorney’s fees for the legal services he provided to Shearer and to the conservatorship. Shearer also filed a declaration on that same date, seeking recovery of \$4,794 for her time and services rendered on behalf of Rose, including efforts to recover some of Rose’s personal property from Rocco. The record contains no orders issued by the trial court with respect to these requests.

On December 23, 2013, Shearer also filed a verified petition in the conservator action to disinherit Rocco and deem that Rocco predeceased Rose, pursuant to Probate Code sections 250 and 259. The record on appeal does not include any of the five exhibits (exhibits A–E) referenced in support of the petition, and neither party has sought to augment the record to include them.

The parties do not explain if Shearer also filed a separate petition to disinherit Rocco in the estate action or whether the petition that appears in the conservator action was somehow deemed to have been filed in that action as well. If a separate petition was filed in the estate action, it does not appear in the record, and neither party has sought to augment the record to include it.

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<sup>7</sup> In her brief, Shearer asserts that Rocco entered a plea of guilty rather than no contest, although there is no evidence in the record to directly support this claim. On the court’s own motion, we have taken judicial notice of our prior unpublished opinion on Rocco’s direct appeal, *People v. Rocco* (Oct. 29, 2014, H039859), which states that Rocco “pleaded guilty to the charge [of elder abuse].”

On April 30, 2014, the trial court in the estate action issued a “judgment re petition to disinherit and deem predeceased Frank Rocco” (capitalization omitted) (the judgment in the estate action). This judgment, which is the sole order (other than the order appointing Shearer as a conservator) issued by the trial court in either case that appears in the record on appeal, granted Shearer’s petition to disinherit Rocco. It indicates that Shearer’s petition was heard on April 30, 2014. Shearer’s attorney appeared on her behalf, and no one appeared on behalf of Rocco. The trial court ruled that, “(1) Frank Rocco is deemed to have predeceased Rose J. Rocco pursuant to Probate Code § 250, and neither he nor his issue are entitled to any property, interest or benefit under any will or trust of Rose J. Rocco or by intestate succession from the decedent; [¶] (2) Frank Rocco is deemed to have predeceased Rose J. Rocco pursuant to Probate Code § 259, and he shall not receive any property, damages or costs that are awarded to the decedent’s estate whether that his entitlement is under a will, trust, or the laws of intestacy, and that he shall not serve as a fiduciary of the Estate of Rose J. Rocco.”

Approximately two weeks after the judgment in the estate action had been issued, Rocco filed in the conservator action a document with several attachments. The first attached document, entitled “Response to Petition,” was apparently intended to be filed in connection with the April 30, 2014 hearing date in the estate action as it lists the case number as the estate action, but it was nevertheless filed in the conservator action. In that document, Rocco argues why he should not be deemed to have predeceased Rose pursuant to various Probate Code sections. In the response Rocco also attached the abstract of judgment reflecting his conviction and sentence for felony elder abuse of Rose.

On May 25, 2014, Rocco filed his notice of appeal listing the case number of the conservator action. In that notice, Rocco indicated that he was appealing from a “ ‘Judgement’ [sic] RE: Petition to disinherit Frank Rocco and Deem him predeced’ [sic] dated: April 30, 2014.” As previously noted, the civil case information statement that

Rocco subsequently filed in this court attached a copy of the judgment entered in the estate action but did not reference the conservator action other than by listing its case number.

## **II. DISCUSSION**

### *A. Jurisdiction*

We first consider the extent of our jurisdiction. Rocco filed a notice of appeal listing the case number of the conservator action. His civil case information statement and opening brief similarly list the case number of the conservator action. Furthermore, the trial court prepared the record designated by Rocco, which was drawn from the trial court record for the conservator action. On the other hand, the notice of appeal clearly states that it is from the judgment regarding the “petition to disinherit Frank Rocco” issued on April 30, 2014, by the trial court, and this is the judgment attached to his civil case information statement. It is undisputed that this judgment was issued in the estate action. In addition, the cover of Rocco’s reply brief (although not his opening brief) lists the case number of the estate action. Rocco’s substantive legal arguments relate to orders made by the trial court in both the conservator and estate actions.

Shearer filed a motion to dismiss Rocco’s appeal prior to the preparation of the record by the trial court on the ground that “[n]o judgment pertaining to the subject matter of Frank Rocco’s appeal has ever been issued in Santa Clara Superior Court, case number 113PR171921 [the conservator action].” This court denied the motion on December 10, 2014.

Shearer argues that we do not have jurisdiction over an appeal from the estate action because Rocco’s failure to file a notice of appeal “strips this Court of jurisdiction,” and California Rules of Court, rule 8.60 (rule 8.60) precludes this court from giving a party relief from default for failure to file a timely notice of appeal. Shearer does not argue that she was misled by Shearer’s notice of appeal or suffered any prejudice by Rocco’s inclusion of an incorrect case number on his notice of appeal. Shearer also does

not assert in her briefing that this court does not have jurisdiction over the conservator action.

“It is and has been the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.” (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) The mere fact that an appellant has not used the correct superior court case number is not dispositive. “Although competent attorneys will ensure that the correct case number is affixed to the notice of appeal, there is no authority for the proposition that an incorrect case number deprives an appellate court of jurisdiction.” (*D’Avola v. Anderson* (1996) 47 Cal.App.4th 358, 362 (*D’Avola*).)

We conclude that Rocco’s notice of appeal “is sufficient in that it states in substance from what plaintiff is appealing,” (*D’Avola, supra*, 47 Cal.App.4th at p. 362) to give us jurisdiction over his appeal of the judgment issued in the estate action. We deem Rocco’s notice of appeal to apply to the estate case, based on the repeated clear references that he is appealing the judgment that was in fact issued in that case. We are thus not excusing Rocco from default for failing to file a notice of appeal pursuant to rule 8.60 but instead are construing the existing notice of appeal to include a challenge to the judgment in the estate action.

Shearer has not renewed the argument made in her earlier motion to dismiss the appeal that we do not have jurisdiction to consider Rocco’s notice of appeal from the conservator action. Section 1300 makes appealable a number of orders made by the probate court, including “[s]ettling an account of a fiduciary,” “[d]irecting or allowing payment of a debt, claim, or cost,” and “[f]ixing, authorizing, allowing, or directing payment of compensation or expenses of an attorney.” (§ 1300, subds. (b), (d) & (e).) Although Rocco does not provide us copies of any orders in the conservator action other than the order appointing Shearer as conservator, he does reference a number of orders, in



particular orders directing payment to Shearer and her attorney. We therefore proceed to the merits of Rocco's appeals in the conservator and estate actions.

*B. Foundational Principles of Appellate Review*

Because our assessment of the merits ultimately turns on basic principles of appellate review, we briefly set out those principles here. It is well-settled that on appeal the burden is on the appellant to provide an adequate record, and “[i]n numerous situations, appellate courts have refused to reach the merits of an appellant’s claims because no reporter’s transcript of a pertinent proceeding or a suitable substitute was provided.” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186.) This general rule is grounded in “the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown.” (*Id.* at p. 187.) When the record on appeal does not include the materials necessary to demonstrate prejudicial error, the appellate court cannot conduct the meaningful review necessary to decide the matter. “ ‘Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].’ ” (*Ibid.*)

An order of the trial court is presumed to be correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) “ ‘All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ ” (*Ibid.*; see Cal. Const. art. VI, § 13.) An appellant has the burden of establishing that the lower court erred or abused its discretion. (*Denham, supra*, at pp. 564, 566.) An appellant must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” (Cal. Rules of Court, rule 8.204(a)(1)(C).)

Our review is also circumscribed by the general rule that a reviewing court is limited to the record before the lower court making the decision being reviewed. “As a general rule, documents not before the trial court cannot be included as a part of the

record on appeal.” (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184 fn. 1.; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) “It has long been the general rule and understanding that ‘an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.’ [Citation.] This rule reflects an ‘essential distinction between the trial and the appellate court . . . that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law.’ ” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

Similarly, “as a general rule, issues not raised in the trial court cannot be raised for the first time on appeal.” (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1237 (*Esparza*)). “The general rule against new issues is subject to an exception that grants appellate courts the discretion to address questions not raised in the trial court when the theory presented for the first time on appeal involves only a legal question determinable from facts that are (1) uncontroverted in the record and (2) could not have been altered by the presentation of additional evidence.” (*Id.* at pp. 1237–1238.)

Rocco’s briefing asks us to disregard these principles. He “requests that this appellate court conduct these proceedings under a de novo standard of review [and] . . . declare a miscarriage of justice.” However, Rocco’s claims involve factual determinations resolved against him by the trial court. Assessment of Rocco’s claims on appeal would require us to know significantly more about the trial court proceedings than the record before us provides. With respect to all of his claims, Rocco fails (1) to show that he timely raised these issues before the trial court; (2) to provide a transcript or settled statement of the proceedings that would explain how the trial court reached its decision; and (3) in all but two of the challenged rulings, to give us a copy of the orders he now challenges.

### *C. Rocco's Claims on Appeal*

#### 1. Claims Related to Conservator Action

Rocco first argues that Shearer “committed conversion by intentionally and substantially liquidating all trust assets of the ‘Rose J. Rocco Revocable Trust’ dated: April 2007.” Rocco asserts, pursuant to the terms of the trust, Rose intended to “ ‘leave or will’ ” all personal property and assets in the trust to him. Rocco contends he is the “sole beneficiary of the trust instrument,” and he seeks “double damages” for Shearer’s conversion of trust assets. We are unable to review this claim, as Rocco does not identify any order associated with it. Further, the record on appeal contains neither a copy of the trust nor any orders or judgments relating to any such trust.

Rocco also contends the trial court “erred by not appointing a neutral conservator.” Although the order appointing Shearer as conservator is included in the record, there are no documents in the record showing that Rocco opposed Shearer’s efforts to be appointed Rose’s conservator. Because Rocco cannot show that he raised this issue in the trial court, and he does not assert that any exceptions to the bar on raising new claims on appeal apply, we cannot review this claim on appeal. (*Esparza, supra*, 13 Cal.App.5th at pp. 1237–1238.)

Rocco asserts that Shearer “deprived Rose . . . of her monetary assets after [Shearer] took possession of estate funds[,] [and] was . . . paying attorney Mezzetti ‘outlandish’ fees” along with “ ‘probate fees’ ” to Rose’s ex-husband. Rocco “formally objects to attorney Mezzettis’ [*sic*] legal fees on the grounds of excessive, unwarranted billing.” Rocco requests that we “reverse the fee orders.” Rocco has not included any copies of such orders in the record on appeal nor provided us with transcripts or settled statements of the relevant hearings. We cannot, therefore, review the trial court’s orders or assess the merits of Rocco’s claims of error.

Rocco also contends that the court-appointed probate investigator failed to inform Rose of her legal rights as a conservatee. We have no documents related to the conduct

of any probate investigator, and Rocco has neither demonstrated that he has standing to bring this claim nor explained why it is not moot in light of Rose’s death. For these reasons, we do not further address it.

## 2. Claims Related to Estate Action

Rocco argues that the trial court erred in granting Shearer’s petition to disinherit him and in finding that he predeceased Rose under sections 250 and 259. Rocco “declares he was not charged with murder nor of intentionally injuring [Rose]” and “points to [his] recent motion to augment [the] record on appeal.” Rocco’s motion to augment the record on appeal was denied by separate order of this court dated December 21, 2017. This denial was “without prejudice to a further showing that the requested documents were part of the record in the proceeding . . . which is the subject of this appeal,” but our review of the docket does not show that Rocco ever renewed his motion to augment. Accordingly, we do not consider any of the documents referenced in that portion of Rocco’s brief, other than certain pages of some of those documents which were included in the record on appeal.<sup>8</sup>

Rocco states—without supporting citation to the record—that Rose’s injuries were caused by an “accident,” and the police department “fabricated their own version of events on December 14th 2012 in order to gain maximum sentence exposure.” Rocco further asserts that, in his criminal proceedings, the district attorney “did not prove by a preponderance of the . . . evidence that [Rocco] acted with ‘specific intent’ in commission of the offense.” Accordingly, the “trial court judge drew erroneous conclusions based on false accusations, unsubstantiated claims, made by . . . Shearer and her attorney that swayed the trial court judge to make an incorrect ruling against [Rocco].”

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<sup>8</sup> See footnote 4, *ante*.

Pursuant to section 250, subdivision (a) (hereafter section 250(a)), “A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

[¶] (1) Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest, including any general or special power of appointment conferred by the will or trust on the killer and any nomination of the killer as executor, trustee, guardian, or conservator or custodian made by the will or trust. [¶] (2) Any property of the decedent by intestate succession.” (§ 250, subd. (a)(1), (2).)

Absent a “final judgment of conviction of felonious and intentional killing,” the trial court “may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this part.” (§ 254, subds. (a), (b).) The limited case law discussing section 254 suggests that the trial court’s conclusion is reviewed for substantial evidence. (See *Principal Life Ins. Co. v. Peterson* (2007) 156 Cal.App.4th 676, 686 [a conviction presently on appeal “may constitute substantial evidence of a felonious and intentional killing for purposes of Probate Code sections 252 and 254”].)

As the statute directs the trial court to make its determination “by a preponderance of evidence” (§ 254, subd. (b)), any review of that ruling necessarily examines the trial court’s factual determinations. On appeal, we review a trial court’s factual conclusions using the substantial evidence standard. (See *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) Accordingly, we would ordinarily review the record, and draw any reasonable inferences therefrom, in the light most favorable to the judgment and uphold the judgment where the record contains substantial evidence to support it. (*Estate of Beach* (1975) 15 Cal.3d 623, 631.) However, where inadequacies in the record prevent us from assessing error, an appellate claim will be resolved against an appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296.)

Rocco appeals from the judgment entered April 30, 2014, in the estate action, in which the trial court granted Shearer’s petition to deem that Rocco predeceased Rose

under sections 250 and 259. Other than this judgment, the record relevant to this claim contains only a copy of Shearer's verified petition (but none of its supporting exhibits and declarations) filed in the conservator action and a copy of Rocco's response, which he apparently unsuccessfully sought to file in the estate action, and which was filed in the conservator action nearly two weeks after the April 30, 2014 hearing date reflected on the judgment in the estate action.

The following documents do *not* appear in the record, either because they are part of the record in the estate case or because they do not exist: the petition to disinherit Rocco filed by Shearer in the estate action, complete with any supporting exhibits and declarations, a reporter's transcript from the April 30, 2014 hearing on Shearer's petition, and any settled statement related to that hearing.

In order to review whether substantial evidence supports the judgment, this court would need to see, at a minimum, complete copies of the moving and opposing papers, including all exhibits and declarations submitted in support of those papers, as well as a transcript or settled statement from the underlying hearing. Here, we have a petition filed in the conservator action, which may not be the same as the petition which may have been filed in the estate action. We do not even have a complete copy of that petition, since none of the exhibits referenced therein are included in the clerk's transcript.

Rocco points us to documents that suggest that he did not intentionally kill Rose and therefore should not have been disinherited pursuant to section 250(a). But neither Rocco's briefing nor the record on appeal provides us with any information about how the trial court arrived at its factual determination that Rocco had "feloniously and intentionally kill[ed]" his mother. (§ 250(a).) As we have no records to assist us in understanding how the trial court arrived at the conclusion embodied in its judgment, we must affirm it.

### **III. DISPOSITION**

The judgments are affirmed. Shearer shall recover her costs on appeal.

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DANNER, J.

WE CONCUR:

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MIHARA, ACTING, P.J.

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GROVER, J.

***Rocco v. Shearer***  
**H041123**